No. 06-35669

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUHAMMAD SHABAZZ FARRAKHAN, aka Ernest S. Walker;
AL-KAREEM SHADEED; MARCUS X. PRICE;
RAMON BARRIENTES; TIMOTHY SCHAAF; CLIFTON BRICENO,

Plaintiffs - Appellants,

v.

CHRISTINE O. GREGOIRE; SAM REED;
HAROLD W. CLARKE; STATE OF WASHINGTON,

Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of Washington, Spokane
Honorable Robert H. Whaley, Senior District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Pacific Legal Foundation and Center for Equal Opportunity state that they are nonprofit organizations, they have no parent companies, and they have not issued shares of stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded 37 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based racial preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

PLF submits this brief because it believes its public policy perspective and litigation experience in the area of equal protection and voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports colorblind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education and voting. CEO has participated as amicus curiae in numerous cases concerning equal protection and voting rights, such as *Ricci*, 129 S. Ct. 2658; *Holder*, 129 S. Ct. 2504 (2009); *Bartlett*, 129 S. Ct. 1231; *Parents Involved*, 551 U.S. 701; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Gratz*, 539 U.S. 244; and *Grutter*, 539 U.S. 306. Most notably, CEO participated as amicus curiae in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), a case that determined Section 2 of the Voting Rights Act cannot be used to invalidate a state's felon disenfranchisement law. In addition, officials from CEO have testified before Congress regarding the Voting Rights Act and on the issue of felon disenfranchisement.

Amici have a substantial interest in ensuring that felons are prevented from trampling on the states' sovereign power to punish criminal offenders, or dissolving the states' primary responsibility for regulating the times, places, and manner of conducting elections. They contend that Section 2 of the Voting Rights Act cannot be used to challenge state felon disenfranchisement laws, which are expressly permitted by the Fourteenth Amendment. U.S. Const. amend. XIV, § 2.

INTRODUCTION AND SUMMARY OF ARGUMENT

The authority of states to enact felon disenfranchisement laws is specifically set forth in the United States Constitution. U.S. Const. amend. XIV, § 2. Accordingly, all nine states in the Ninth Circuit and forty-eight states in the nation have such laws. But Plaintiffs, who are convicted felons and racial minorities, urge this Court to strike down Washington's felon disenfranchisement law under Section 2 of the Voting Rights Act (Act), because they claim they are being denied the right to vote based on race. The district court rejected Plaintiffs' vote denial claim, noting that Plaintiffs "presented no evidence that their own criminal prosecutions were the result of discriminatory animus, or that they were anything but race-neutral." *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *18 (E.D. Wash. Dec. 1, 2000). Plaintiffs argue that a disproportionate number of racial minorities are being disenfranchised following felony convictions. *Id.* at *3. However, the court concluded the Act provides no remedy for Plaintiffs, because there is no "causal connection between the disenfranchisement provisions" and denial of the right to vote based on race. *Id.* at *4.

The holding of the district court is consistent with the decisions of every other circuit that has already considered this issue and held that Section 2 cannot be used to challenge state felon disenfranchisement laws. Three circuits, including two *en banc*, specifically rejected Section 2 challenges to felon disenfranchisement.

Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009); *Hayden*, 449 F.3d 305 (*en banc*); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*). Two circuits rejected similar claims without directly considering whether felon disenfranchisement statutes are immune from attack under Section 2. *Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680, at *1 (4th Cir. Feb. 23, 2000) (per curiam); *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir. 1986) (treating claim as a dilution claim).

Analysis of the text, context, and legislative history of the Act leads to the conclusion that the decision of the district court should be affirmed. The Fourteenth Amendment expressly permits states to adopt disenfranchisement statutes, which have long been accepted in the American legal system. U.S. Const. amend. XIV, § 2, *Johnson*, 405 F.3d at 1217. Many such laws were enacted long before African-Americans enjoyed suffrage, and they are not racially discriminatory. *Id.* at 1218, 1228 n.28; *Baker v. Pataki*, 85 F.3d 919, 928 (2d Cir. 1996). Felon disenfranchisement laws are beyond the reach of the Act because its legislative history clearly shows that the statute was not intended to cover felon disenfranchisement laws. *Hayden*, 449 F.3d at 326. If the Act were construed to encompass such laws, the Act would exceed Congress's enforcement powers of the Fifteenth Amendment under the "congruence and proportionality" test from *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997), because there is a complete absence of congressional findings that felon disenfranchisement laws have been used to

discriminate against minority voters. *Johnson*, 405 F.3d at 1231. Finally, even apart from the legislative history and lack of congressional intent to outlaw felon disenfranchisement provisions, Plaintiffs cannot show a violation of Section 2 of the Act, because there is no evidence that each of them is a victim of purposeful discrimination in Washington's criminal justice system. Even if Plaintiffs could make out a *prima facie* case, the State's strong interest in limiting the franchise to citizens who follow the law would rebut it.

Reversal of the district court's decision would jeopardize similar laws in all remaining eight states in this Court's jurisdiction, and result in the disruption of legitimate state electoral practices in the entire Western United States. Amici thus urge this Court to affirm the decision of the district court.

ARGUMENT

I

FELON DISENFRANCHISEMENT LAWS ARE DEEPLY ROOTED IN THE NATION'S HISTORY AND ARE NOT RACIALLY DISCRIMINATORY

In granting Washington's motion for summary judgment, the district court correctly held that, even if racial minorities were being disproportionately disenfranchised as a result of their felony convictions, such a disparate impact could not be remedied by Section 2 of the Act. *Farrakhan*, 2000 U.S. Dist. LEXIS 22212, at *4. Plaintiffs "failed to establish a causal connection between the

disenfranchisement provision and the prohibited result." *Id.* Importantly, the court noted that "felon disenfranchisement provision[s are] not inherently or inevitably discriminatory." *Id.* at 6. The court's holding is supported by the long history of felon disenfranchisement in this country.

As Judge Henry Friendly once stated, someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them. *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967). The idea "could well have rested on Locke's concept" of the social compact, "so influential at the time." *Id.* Whatever its philosophical origins, it can hardly be deemed unreasonable for a state to decide that perpetrators of serious crimes should not take part in electing the legislators who make the laws, the executives who enforce the laws, the prosecutors who must try perpetrators for further violations, or the judges who consider their cases. *Id.*

That view has prevailed throughout American history. "Felon disenfranchisement laws are unlike other voting qualifications," as they are "deeply rooted in this Nation's history." *Johnson*, 405 F.3d at 1228. "The practice of denying the vote to individuals convicted of certain crimes is a very old one that existed under English law, in the colonies, and in the earliest suffrage laws of the states." Nat'l Comm'n on Fed. Election Reform, *To Assure Pride and Confidence in the Electoral*

Process 45 (Aug. 2001);[1] *see also Hayden*, 449 F.3d at 316 ("[L]aws disenfranchising felons were adopted in the American Colonies and the Early American Republic."). The prohibition challenged here traces its roots back to Washington's Constitution of 1866, four years before the Fifteenth Amendment extended the right to vote to African-Americans. *State v. Collins*, 69 Wash. 268, 270-71 (1912). "[T]wenty-nine states had such provisions when the Fourteenth Amendment was adopted " in 1868. *Green*, 380 F.2d at 450.

That long history refutes any suggestion that felon disenfranchisement provisions like Washington's are racially motivated. Their origins pre-dating the Fourteenth and Fifteenth Amendments show plainly that they affected only white men. As the Eleventh Circuit observed, "[a]t that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any [felon] disenfranchisement law." *Johnson*, 405 F.3d at 1218. "The prevalence of these laws before African-Americans were granted the right to vote indicates that states have historically maintained these laws for race-neutral reasons." *Id.* at 1228 n.28. It also "indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to perpetuate racial discrimination forbidden by those amendments." *Baker*, 85 F.3d at 928.

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[1] *Available at* http://www.reformelections.org/data/reports/99_full_report.pdf (last visited May 12, 2010).

The framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchisement. To the contrary, they expressly recognized the power of the states to prohibit felons from voting. The Fourteenth Amendment specifically provides that States have the authority to prohibit those convicted of a crime from voting. Section 2 of the Fourteenth Amendment provides that the right to vote shall not be abridged, "except for participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. As the Supreme Court held in *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974), Section 2 is thus "an affirmative sanction" by the Constitution of "the exclusion of felons from the vote"—even felons who, like the plaintiffs in *Richardson*, had finished their sentences. This conclusion

> rest[s] on the demonstrably sound proposition that § 1 [the Equal Protection Clause], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement.

Id. at 55. Section 2 of the Fourteenth Amendment thus "*expressly* permits states to disenfranchise convicted felons." *Johnson*, 405 F.3d at 1217 (emphasis added).

Nor did the Reconstruction Congresses see any conflict between felon disenfranchisement and the Fifteenth Amendment. As the Supreme Court observed at length in *Richardson*, Congress, in readmitting states to the Union, consistently approved state constitutions that excluded felons from voting. *Richardson*, 418 U.S. at 48-52. In fact, the Fortieth Congress—*the very same Congress that proposed the*

Fifteenth Amendment—approved such constitutions, and the next Congress did so both before *and after* the Fifteenth Amendment was ratified. *Id.* (citing readmission statutes enacted in June, 1868, and January, February, March, and May, 1870); *see also Johnson*, 405 F.3d at 1219 n.7 (noting that following the Civil War, many of the new congressionally approved state constitutions contained felon disenfranchisement laws).[2]

Courts have consistently held not only that "the states had both a right to disenfranchise [felons and] ex-felons," but that they had "a compelling interest in doing so." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 162 (2000). In 1890, for example, the Supreme Court held that a territorial legislature's statute that "exclude[d] from the privilege of voting . . . those who have been convicted of certain offences" was "not open to any constitutional or legal objection." *Davis v. Beason*, 133 U.S. 333, 347 (1890). A unanimous Warren Court decision recognized that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959). The Court's view has not changed: the holding "that a convicted felon may be denied

[2] The Fifteenth Amendment was passed on February 26, 1869, by the Fortieth Congress (which began on March 4, 1867, and ended on March 3, 1869), and was ratified on February 3, 1870, during the Forty-First Congress.

the right to vote" remains "unexceptionable." *Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also, e.g.*, *Green*, 380 F.2d at 451 (noting the Supreme Court "frequently recognized" "propriety of excluding felons from the franchise," and citing cases).

Accordingly, as the National Commission on Federal Election Reform—a bipartisan, blue-ribbon panel chaired by former Presidents Ford and Carter—observed, the states are free to disenfranchise felons as they see fit: "the question of whether felons should lose the right to vote is one that requires a moral judgment by the citizens of each state." Nat'l Comm'n on Fed. Election Reform, *supra*, at 45. The bipartisan commission recommended a judgment similar to Washington's—disenfranchisement until felons "have fully served their sentence, including any term of probation or parole"—while acknowledging that states were free even to disenfranchise felons for life. *Id.* The commission also concluded that "we doubt that Congress has the constitutional power to legislate a federal prescription on this subject." *Id.*

Today, the overwhelming majority of all states continue to judge felons unfit to vote. By 1967, the number of states disenfranchising felons had "risen to forty-two," *Green*, 380 F.2d at 450, and "[t]oday, all states *except two* have some form of criminal disenfranchisement provision." *Johnson*, 405 F.3d at 1228 (emphasis added). The District of Columbia also has such a provision. The District's current felon disenfranchisement law was enacted by its own locally elected council

after the introduction of home rule in 1974, and was submitted to—and not objected to by—the Congress of the United States.[3]

Felon disenfranchisement enjoys overwhelming popular support from blue states to red states. In 2000, voters in Massachusetts, a blue state, approved a state constitutional amendment that disenfranchised incarcerated felons with 60 percent voting "yes" and only 34 percent voting "no." *Simmons*, 575 F.3d at 27. Earlier in 1998, the same result occurred in Utah, a red state. There, the state's voters approved a constitutional amendment disenfranchising felons which passed virtually by acclamation: 82 percent to 18.[4]

The Massachusetts and Utah voters' moral judgment was the same judgment that has been demonstrated by voters in virtually every other state throughout American history. It was perhaps put best by a Massachusetts state legislative leader, who said of that state's now-abolished practice of allowing incarcerated felons to vote:

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[3] Before granting home rule, Congress enacted felon disenfranchisement in the District. *See* Pub. L. 92-220, § 4, 85 Stat. 788 (1971); District of Columbia Election Act, § 2(2)(C), 69 Stat. 699 (1955). Home rule gave the D.C. Council plenary power over voter qualifications in the District, D.C. Code Ann. § 1-207.52, subject to congressional review, D.C. Code Ann. § 1-206.02(c)(1); the D.C. Council amended the election code to disenfranchise felons only during incarceration, D.C. Code Ann. §§ 1-1001.02(7)(A)-(B), 1-1001.07(k)(1), 1-1001.07(k)(3)-(4).

[4] *See* Utah Const. art. IV, § 6; Utah Code Ann. § 20A-2-101.5; Tiffany T. Cox, *Legislative Development: II. Criminal Law and Procedure*, 1998 Utah L. Rev. 716, 716 n.3 (resolution passed 386,957 to 85,080).

> It makes no sense. . . . We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run *our* lives?[5]

But that is precisely the intent that the Plaintiffs would have this Court ascribe to Congress here.

II

THE VOTING RIGHTS ACT DOES NOT APPLY TO FELON DISENFRANCHISEMENT LAWS

A. Legislative History and Intent Do Not Support Plaintiffs' Construction of the Act

Plaintiffs claim that they have been denied the right to vote in violation of the Act due to race bias in, or the discriminatory effect of, Washington's criminal justice system. *Farrakhan*, 2000 U.S. Dist. LEXIS 22212, at *3. Thus, the dispositive question in this case is whether, in enacting and amending Section 2 of the Act, Congress intended to prohibit the states from denying the franchise to felons.

The statutory text is notably ambiguous, for "[u]nfortunately, it 'is exceedingly difficult to discern what [Section 2] means.'" *Muntaqim v. Coombe*, 366 F.3d 102, 116 (2d Cir. 2004) (quoting *Goosby v. Town Bd.*, 180 F.3d 476, 499 (2d Cir. 1999) (Leval, J., concurring)); *accord Johnson*, 405 F.3d at 1229 n.30 ("[T]he deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is

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[5] Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159, 172 (2001) (emphasis added; citation omitted).

unclear."). Where, as here, "the statute is ambiguous . . . [,] courts may look to its legislative history for evidence of congressional intent." *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

The legislative history of the Act unambiguously resolves this case against Plaintiffs. The only provision of the Act that Congress thought could even implicate felon disenfranchisement was not Section 2, but Section 4, which prohibits any requirement of "good moral character" to vote. 42 U.S.C. § 1973b(c)(3). But the Senate Judiciary Committee's report took pains to note that even Section 4

> would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony.

S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562. On the floor, Senator Tydings repeated that the law would not bar states from imposing

> a requirement that an applicant for voting or registration for voting be free of conviction of a felony. . . . These grounds for disqualification are objective, easily applied, and do not lend themselves to fraudulent manipulation.

111 Cong. Rec. S8366 (1965).

The House Judiciary Committee report agreed. The Act

> does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony.

H.R. Rep. No. 439, 89th Cong., 1st Sess. 25-26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

"These are the only references to felon disenfranchisement made in reports to the 1965 act." *Johnson*, 405 F.3d at 1233. As the Eleventh Circuit noted, these reports demonstrate:

- "Congress did not intend Section 2 of the []Act to cover felon disenfranchisement provisions";
- "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not"; and
- "legislators intended to *exempt* the voting restrictions on felons from the statute's coverage."

Id. at 1233.

The 1982 amendments to the Act did not alter the prior understanding regarding the disenfranchisement of felons. *Simmons*, 575 F.3d at 39. The amendments' history reflects absolutely no intention to outlaw felon disenfranchisement. Even though it "details many discriminatory techniques used by certain jurisdictions," "[t]here is simply *no* discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments." *Johnson*, 405 F.3d at 1234 (emphasis added). Indeed, "considering the prevalence of felon disenfranchisement . . . in every region of the country since the Founding, it seems

unfathomable that Congress would silently amend the [Act] in a way that would affect them." *Id.* (quoting *Muntaqim*, 366 F.3d at 123-24).

Overturning felon disenfranchisement remains unfathomable to Congress to this very day. The Act's "one-sided legislative history is buttressed by subsequent congressional acts. Since 1982, Congress has enacted laws making it *easier* for states to disenfranchise felons." *Id.* at 1234. Thus:

- *The National Voter Registration Act of 1993* not only provides that a felony conviction may be the basis for canceling a voter's registration, but requires federal prosecutors to notify state election officials of federal felony convictions.[6]
- *The Help America Vote Act of 2002* instructs state election officials to purge disenfranchised felons "on a regular basis" from their computerized voting lists.[7]

The enactment of these provisions plainly "suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the [Act]." *Johnson*, 405 F.3d at 1234 n.39.

Under Washington law, voting rights are restored to felons once they are no longer under the authority of the state department of corrections. Wash. Laws of

[6] 42 U.S.C. §§ 1973gg-6(a)(3)(B) & (g)(1).

[7] 42 U.S.C. § 15483(a)(2)(A)(ii)(I).

2009, ch. 325, HB 1517. When the Senate considered what ultimately became the Help America Vote Act, the Senate voted on a floor amendment that would have required states to do what Washington already does: allow felons to vote after they have completed their terms of incarceration, parole, or probation. *See* 148 Cong. Rec. S797-98 (2002) (proposed amendment 2879 to S. 565). The proposal would only have applied to *federal* elections, and even its Democrat sponsors emphasized they had no quarrel with denying the franchise to convicts who were still serving their sentences. In the words of the principal sponsor, Senator Reid:

> We have a saying in this country: "If you do the crime, you have to do the time." I agree with that . . . . [T]he amendment . . . is narrow in scope. It does not extend voting rights to prisoners . . . . I don't believe in that. It does not extend voting rights to ex-felons on parole.

Id. at S801, S802 (statement of Sen. Reid); *see also id.* at S804-05 (statement of co-sponsor, Sen. Specter). Despite being "narrow in scope," the amendment was rejected by a large bipartisan majority of 63 nays to only 31 yeas. *Id.* at S809 (23 Democrats and 40 Republicans voted "nay").

Since then, bills have been repeatedly introduced in Congress that essentially copy Senator Reid's proposal verbatim, but not one has been voted out of committee.[8]

[8] Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(d) (2005); Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. § 4 (2005); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. § 4 (2003); *see also* Civic Participation & Rehabilitation Act of 2003, H.R. 259, 108th Cong. § 3 (2003).

This legislative record belies the contention that Congress sought to do away with felon disenfranchisement in any form.

B. The "Clear Statement" Rule Precludes Plaintiffs' Reading of the Statute

An expansive reading of the Act to cover felon disenfranchisement laws would be contrary to the intent of Congress, and upset the balance between federal and state powers. But because the text of the Act is unclear on this issue, the "clear statement" rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991) must be applied:

> [I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute.

Id. at 460 (emphasis added; citations and internal quotation marks omitted). If a statute is intended to "pre-empt[] the historic powers of the States," Congress must make its intention *clear* and *manifest*. *Id.* at 461 (emphasis added; citations and internal quotation marks omitted).

This rule of construction controls whenever a federal statute touches on "traditionally sensitive areas, such as legislation affecting the federal balance." *Id.* (citations and internal quotation marks omitted). When it applies, the rule requires that, absent a clear statement, courts must "interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers.'" *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 461).

Gregory illustrates how the "clear statement" rule applies. In *Gregory*, the Supreme Court addressed the question of whether the Age Discrimination in Employment Act prohibited Missouri from enforcing a mandatory retirement age for state judges. The Court held that it did not, applying the clear statement rule. According to the Court, the issue implicated "the authority of the people of the States to determine the qualifications of their government officials." *Gregory*, 501 U.S. at 464. Because Congress's intent on the issue was unclear, the Court refused to "give the state-displacing weight of federal law to mere congressional *ambiguity*." *Id.* at 464 (citation and internal quotation marks omitted).

As recognized by the Second Circuit, Congress did not clearly specify that felon disenfranchisement provisions are covered by the Act, "and the evidence of Congressional intent suggests that Congress did not in fact intend to cover such provisions." *Hayden*, 449 F.3d at 326. The Second Circuit found that the Act is "sufficiently ambiguous for the clear statement rule to be applied." *Id.*; *see also Johnson*, 405 F.3d at 1232 ("[W]e must look for a clear statement from Congress that it intended such a constitutionally-questionable result."). In fact, the Supreme Court has never resorted to the plain text alone to give Section 2 meaning, *Simmons*, 575 F.3d at 35, but has resorted to legislative history. *See Perry*, 548 U.S. at 426 (reviewing senate report on the 1982 amendments to interpret Section 2).

The test for using the clear statement rule is satisfied here, because prohibiting felon disenfranchisement laws would alter the usual constitutional balance between the States and the Federal Government. States have the power to determine the "qualifications of their government officials." *Gregory*, 501 U.S. at 464. Felon disenfranchisement involves state authority that is equally important—the authority for determining who gets to *choose* those officials and their qualifications. "If defining the qualifications of important government officials lies at the heart of representative government, then surely defining who decides what those qualifications will be is equally important." *Johnson*, 405 F.3d at 1232 n.35. Acceptance of Plaintiffs' claim that Washington's felon disenfranchisement provision violates Section 2 of the Act would cripple fundamental state power to "defin[e] and enforc[e] the criminal law," for which "the States possess primary authority." *Muntaqim*, 366 F.3d at 121 (quoting *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995)).

These two fundamental lines of state authority—determining state officials and their qualifications, and determining who gets to choose them—expressly appear in the Constitution's text. The responsibility for the conduct of elections is a power delegated in the Constitution to the States: "[T]he People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2. States have

"broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns." *Lassiter*, 360 U.S. at 50 (citation omitted). The states have a "wide scope" of power to set voter qualifications, such as "[r]esidence requirements, age, [and] *previous criminal record*." *Id.* at 51 (emphasis added).

Thus, not only does the Constitution defer to the states to set voter qualifications even for *federal* elections (U.S. Const. art. I, § 2 (House of Representatives); U.S. Const. amend. XVII (Senate)), but, as previously noted, the Constitution *affirmatively sanctions* the states' historic authority to disenfranchise people "for participation in rebellion, *or other crime*," U.S. Const. amend. XIV, § 2 (emphasis added). The Constitution clearly confers upon the States the authority to decide whether felons should vote.

If Congress intended to disturb the federal-state balance in the area of voter qualifications, Congress knew how to make its intent clear. Congress has shown that it knows how to be clear when it comes to voting rights—it was clear about literacy tests, 42 U.S.C. §§ 1971(a)(2)(C) & (3)(B), 1973b(c)(1); it was clear about educational-attainment requirements, 42 U.S.C. § 1973b(c)(2); it was clear about knowledge tests, *id.*; it was clear about moral character tests, 42 U.S.C. § 1973b(c)(3); it was clear about vouching requirements, *id.*; it was clear about English-language requirements, 42 U.S.C. § 1973b(e); it was clear about English-only elections,

42 U.S.C. § 1973b(f)(3); and it was clear about poll taxes, 42 U.S.C. § 1973h(a), to give just a few examples.

But the text of the Act makes no statement at all about felon disenfranchisement. Therefore, it cannot be construed "to pre-empt the historic powers of the States," *Gregory*, 501 U.S. at 461 (citations and internal quotation marks omitted), and "to destroy the States substantial sovereign powers" by prohibiting felon disenfranchisement, *Pennsylvania Dep't of Corr.*, 524 U.S. at 209 (citations and internal quotation marks omitted).

C. Plaintiffs' Construction of Section 2 Would Exceed Congress's Fifteenth Amendment Enforcement Powers

Acceptance of Plaintiffs' Section 2 claim would mean that Congress has the authority under the Fifteenth Amendment to prohibit what the Fourteenth Amendment specifically allows. Such a construction of Section 2 must be rejected, because it would exceed Congress's powers to enforce the Fifteenth Amendment—or, at a minimum, would "present[ ] grave constitutional questions" that this Court, through a narrower reading, can and must avoid. *Johnson*, 405 F.3d at 1229 (citing *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Indeed, as the bipartisan Ford-Carter Commission concluded, it is "doubtful" that

Congress has the power to require states to enfranchise even those felons who have completed their sentences.[9]

An interpretation of the Act that allows Congress to prohibit felon disenfranchisement laws would mean that Congress has rewritten the Fifteenth Amendment in the guise of enforcing it. But "Congress does not enforce a constitutional right by changing what the right is." *City of Boerne*, 521 U.S. at 519. Congress can only "enact so-called prophylactic legislation" to the extent necessary "in order to *prevent* and *deter* unconstitutional conduct." *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) (emphasis added). "There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520 (emphasis added). To meet that test, Congress must

- *first*, develop a "legislative record" that demonstrates a "history and pattern" of unconstitutional state conduct, *Bd. of Trustees v. Garrett*, 531 U.S. 356, 368 (2001); and

[9] Task Force on the Constitutional Law & Fed. Election Law, *Part X: The Federal Regulation of Elections* 41 (June 29, 2001), *in* Task Force Reports, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (Aug. 2001), *available at* http://web1.millercenter.org/commissions/comm_2001_taskforce.pdf (last visited May 12, 2010).

- *second*, "tailor its legislative scheme to remedying or preventing such conduct," *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999).

Section 2 would plainly fail to meet even the first test were it construed to prohibit felon disenfranchisement. For "when Congress enacted the [Act] and its subsequent amendments, there was a *complete absence* of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters." *Johnson*, 405 F.3d at 1231 (emphasis added). "The legislative record . . . simply fails to show that Congress did in fact identify a pattern" of racial discrimination via felon disenfranchisement. *Garrett*, 531 U.S. at 368. To the contrary, the legislative history of the Act shows that Congress found "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not." *Johnson*, 405 F.3d at 1233. "[N]ot only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext . . . for racial discrimination[,] it has effectively determined that it is not." *Baker*, 85 F.3d at 929.

Section 2's congruence and proportionality as a remedy would be destroyed if Plaintiffs were allowed to challenge state felon disenfranchisement laws based only on disparities in the criminal justice system, and without evidence of intentional discrimination. There are no congruence and proportionality between guaranteeing people the right to vote irrespective of race and a requiring that criminals be allowed

to vote, just because there is a specific transitory racial imbalance at this particular time among felons. *H.R. 3335, the "Democracy Restoration Act"*, at 7 (Mar. 16, 2010) (testimony of Roger Clegg, President and Gen. Counsel, CEO).[10]

To apply Section 2 to strike down all felon disenfranchisement laws, including those enacted and enforced without a discriminatory purpose, would "attempt a substantive change in constitutional protections," *City of Boerne*, 521 U.S. at 532—something the Constitution simply does not allow.

III

SECTION 2'S "RESULTS" TEST CANNOT BE STRETCHED TO OUTLAW FELON DISENFRANCHISEMENT

A. Section 2's "Results" Test Cannot Be Met Here

Even apart from the legislative history and the clear statement rule, Plaintiffs cannot show a violation of Section 2. For "Congress did not wholly abandon its focus on purposeful discrimination when it amended the [Act] in 1982," *Muntaqim*, 366 F.3d at 117 (citation omitted), as it continued to bar only "practices that deny or abridge the right to vote *on account of race or color*." 42 U.S.C. § 1973(a) (emphasis added).[11]

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[10] *Available at* http://judiciary.house.gov/hearings/pdf/Clegg100316.pdf (last visited May 12, 2010).

[11] The arguments in Part II against the applicability of Section 2 of the Voting Rights (continued...)

Convicts like Plaintiffs are not disenfranchised because of their race or color. Rather, they are disenfranchised "because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment." *Wesley*, 791 F.2d at 1262. Accordingly, because "the causation of the denial of the right to vote to felons . . . consists entirely of their conviction, not their race," *Johnson*, 405 F.3d at 1239 (Tjoflat, J., specially concurring), it "does not 'result' from the state's qualification of the right to vote on account of race or color and thus . . . does not violate the [Act]," *Wesley*, 791 F.2d at 1262.

Moreover, "[d]espite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect." *Johnson*, 405 F.3d at 1228. Proving a violation requires more than a "showing of racially disparate effects," *id.* at 1235 (Tjoflat, J., specially concurring); the "mere fact that many incarcerated felons happen to be black and [L]atino is insufficient grounds to implicate the Fifteenth Amendment or the [Act]," even under Section 2, *Jones v. Edgar*, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998). Even with the "results" test, Section 2 still requires proof of discrimination "on account of race or color." *Nipper v. Smith*,

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[11] (...continued)
Act to felon disenfranchisement can also be used in Part III to at least limit Section 2's applicability in the ways we contend.

39 F.3d 1494, 1515 (11th Cir. 1994) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*)).

Statistics showing racial disparities do not alone suffice to establish a Section 2 violation even when the disparities directly relate to the electoral process. But here, the statistics do not directly relate to the electoral process; they relate to arrests, convictions, and sentencing. Case law establishes that evidence of statistical disparities in an area external to voting, which then result in statistical disparities in voting, do not prove a Section 2 violation:

- *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997), rejected a Section 2 claim based on statistical evidence, because "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry."
- *Wesley*, 791 F.2d at 1262, upheld Tennessee's felon disenfranchisement provision against a Section 2 claim that was based on statistical disparities in conviction rates.
- *Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314-15 (3d Cir. 1994), rejected a Section 2 claim that a statute purging voter registrations of those who did not vote for two years had a disparate statistical impact on minorities.

- *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992), rejected a Section 2 claim that an at large voting system harmed minorities because of statistical disparities in voter turnout.
- *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989), rejected a Section 2 claim despite a statistical disparity between the percentage of blacks in the population and the percentage of blacks on the school board.

Plaintiffs ignore these cases, and attempt to prove a denial of voting rights on the basis of evidence that is legally insufficient to establish a claim of racial discrimination in their conviction. The Supreme Court has held that statistical disparities cannot be the basis for a Fourteenth Amendment claim to overturn a criminal conviction or sentence—a defendant must show that *he* or *she* suffered discrimination on the basis of race, and must show that on the basis of facts that happened *in his or her case*. "Because discretion is essential to the criminal justice process," statistical evidence "is clearly insufficient to support any inference that any of the decisionmakers in [a particular] case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987); *see also Ricci*, 129 S. Ct. at 2681 (reliance on threshold showing of a raw statistical disparity in test results is not strong evidence of disparate impact). In other words, to assert the right to vote, convicted felons would need to invoke the very same racial statistics that they cannot invoke to

overturn their convictions. It is extremely unlikely that the Ninety-Seventh Congress and President Ronald Reagan intended such a result.

B. Any *Prima Facie* Showing of Adverse "Results" Is Easily Rebutted

Even assuming the 1982 amendments to the Act established some form of a disparate impact standard, states could rebut any *prima facie* case of disproportional impact because of their strong and legitimate interests in maintaining these electoral laws. *See, e.g.*, Clegg, *supra*, at 173 (discussing the lack of constitutional or Voting Rights Act violations in felon disenfranchisement provisions). Any disparate-impact lawsuit must afford the defendant an opportunity to show that the challenged practice, even if it has a disparate impact, is justified. In an employment case, for example, the defendant has always been allowed to defend challenged practices based upon "business necessity," and the same must be true in voting cases. *Ricci*, 129 S. Ct. at 2673. Prohibiting children or noncitizens from voting can have a disparate impact on a racial or ethnic group, if that group contains younger age cohorts or a disproportionate number of recent immigrants, but surely states may defend this "disenfranchisement" by pointing to legitimate justifications.

States have substantial reasons to limit the right to vote to persons who meet certain minimum, objective standards of trustworthiness, loyalty, and responsibility; accordingly, they may and do exclude from the enterprise of self-government children, noncitizens, the mentally incompetent, and those who have been convicted of serious crimes against their fellow citizens. *See* Roger Clegg, et al., *The Bullet and the Ballot? The Case for Felon Disenfranchisement Statutes*, 14 Am. U. J. Gender Soc. Pol'y & L. 1, 22-25 (2006) (discussing policy reasons for felon disenfranchisement). As discussed in Part I, nearly all states have come to this conclusion, that those not willing to follow the law cannot claim a right to make it. The Supreme Court held that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a [Section] 2 violation [of the 1965 Act] has occurred." *Houston Lawyers' Ass'n*, 501 U.S. at 426. Thus, the Fifth Circuit rejected a challenge to Texas's county-wide election system for its district court judges—notwithstanding the alleged disproportionate impact on racial minority candidates—on the grounds that the state had a "substantial interest" in linking jurisdiction and electoral base, and thereby promoting "the fact and appearance of judicial fairness." *Clements*, 999 F.2d at 868-69 (*en banc*).

States have an equally substantial interest in preventing felons from voting and potentially affecting elections. Thus, the Sixth Circuit held that the state's "legitimate

and compelling interest" in disenfranchising felons outweighed any supposed racial impact. *See Wesley*, 791 F.2d at 1260-61 (felon disenfranchisement law viewed in context of "totality of circumstances," does not violate the Act). Indeed, the Framers of the Reconstruction Amendments found state authority to disenfranchise felons to be of such importance that they expressly permitted it in the text of the Fourteenth Amendment. *See Johnson*, 405 F.3d at 1232 (analyzing the constitutional implications of applying the Act to state felon disenfranchisement provisions). And as the Supreme Court put it, "*[n]o* function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices." *See Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (emphasis added) (discussing the constitutional objective of preserving States' powers and governing autonomy).

Washington's legitimate and compelling interest in disenfranchising felons outweighs Plaintiffs' statistical showing of disparities in that State's criminal justice system.

CONCLUSION

For the reasons stated above, Amici respectfully request that this Court affirm the district court's decision in *Farrakhan v. Locke*, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. Dec. 1, 2000).

DATED: May 17, 2010.

Respectfully submitted,

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FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 06-35669

Form Must Be Signed By Attorney or Unrepresented Litigant *and Attached to the Back of Each Copy of the Brief*

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DATED: May 17, 2010.

s/ Ralph W. Kasarda
RALPH W. KASARDA

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

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